

O'BRIEN, TANSKI & YOUNG, LLP

COUNSELLORS AT LAW

JAMES M. TANSKI
ROLAND F. YOUNG, III
ROBERT D. SILVA
DONNA R. ZITO
HILARY FISHER NELSON
ALBERT G. DANKER, JR.
STEPHEN V. MANNING □
NANCY P. TYLER △
MICHAEL G. RIGG
AMY F. GOODUSKY
REBECCA M. HARRIS

CITYPLACE II
185 ASYLUM STREET, 16TH FLOOR
HARTFORD, CONNECTICUT 06103-3402

(860) 525-2700
TELEFAX (860) 247-7861
www.otylaw.com

RETIRED
DONALD W. O'BRIEN

□ ALSO MEMBER OF MASSACHUSETTS BAR
△ ALSO MEMBER OF FLORIDA BAR

March 23, 2010

TO: MEMBERS OF THE JUDICIARY COMMITTEE

RE: Raised Bill No. 5537

For well over twenty years, the attorneys at O'Brien, Tanski & Young, LLP have been committed to representing the interests of Connecticut hospitals, Connecticut physicians, and other health care providers that have been sued in medical malpractice cases. Our clients are concerned about the current litigation climate that is causing many to limit their practice to specific procedures and specific locales, others to change their specialties to those considered to be at lower risk for litigation, and still others to abandon clinical practice entirely. Our State has lost and continues to lose too many good physicians and nurses. Those who remain in practice are increasingly disheartened and demoralized. Inevitably, all the citizens of this State will suffer as a result because, sooner or later, we all need good health care, if not for ourselves, then for our children or our aging parents.

With the concerns of our clients and all Connecticut citizens in mind, then, we respectfully request the Committee to consider the following recommendations in its deliberations concerning potential amendments to legislation that goes to the heart of the medical malpractice problems facing our State.

I. BACKGROUND

The Connecticut Legislature first enacted Connecticut General Statutes § 52-190a in 1986 as part of tort reform. The Legislature was responding to a crisis in health care providers' ability to obtain medical malpractice insurance as well their continued ability and willingness to continue practicing in Connecticut.

The purpose of the statute was to benefit health care providers,ⁱ and prevent frivolous actions by requiring plaintiffs or their counsel to certify that they had a good faith basis for bringing the suit.ⁱⁱ To ease the burden on prospective plaintiffs and their counsel, the Legislature provided for an automatic 90-day extension of the statute of limitations to allow plaintiffs and their counsel extra time to conduct the good faith inquiry.

The necessary components of the pre-complaint inquiry and the consequences of failing to comply soon became issues in the superior courts of this state. Because the statute failed to address the consequences of failure to file a certificate of reasonable inquiry, courts held that the only remedy available to defendants for such failure were motions that in effect allowed plaintiffs years of extra opportunities to locate experts who would support their causes of action.ⁱⁱⁱ The net effect was that the statute, as interpreted by many trial courts, left defendants with no ability to extricate themselves from cases for which there had been inadequate pre-suit investigation until after years of fruitless and expensive discovery had passed.

After a brief lull following the passage of initial tort reform legislation, medical malpractice insurance premiums in Connecticut began to escalate in the late 1990s and early 2000s.^{iv} In 2005, annual rate increases for some health care providers were as great as 90%.^v These increases consumed financial resources that could have been used for patient care.^{vi} In order to reduce their medical malpractice insurance premiums, many physicians, particularly

obstetricians, began limiting the scope of their practice.^{vii} A number of medical malpractice insurance carriers left the state.^{viii} By 2005, there were only three insurance companies writing physicians and surgeons' medical malpractice liability coverage in Connecticut. A survey conducted by the Connecticut Insurance Department revealed that insurance companies were not interested in writing medical malpractice insurance in Connecticut unless significant tort reform was enacted so that the companies could control their exposures.^{ix}

To provide relief to physicians and hospitals from these crushing premiums, the Legislature in 2004 crafted a broad bill (Public Act 04-155) that was vetoed by then Governor Rowland because it did not include a cap on non-economic damages.

Due to the urgent nature of the problem, the General Assembly returned to the problem in the next session. The act that eventually was passed and signed by Governor Rell was Public Act 05-275, "An Act Concerning Medical Malpractice."

The 2005 statute strengthened the good faith statute in three significant ways: (1) it required that the attorney filing suit to attach to the certificate of merit the written opinion of an expert in the field; (2) it required that the expert offering the opinion to be a "similar health care provider" to the defendants and to provide a "detailed basis for the formation" of the opinion that there "appeared to be evidence of medical negligence," and (3) it mandated dismissal if a plaintiff failed to obtain the required written opinion prior to filing suit. To accommodate plaintiffs' concerns that they would be unable to find experts who were willing to publicize their criticisms, the amendment also permitted plaintiffs' attorneys to redact the identity of the expert who supplied the pre-suit written opinion.

Passage of the new bill has been salutary. Because the language of the statute is explicit, Superior Courts have enforced it, and the Appellate Court has upheld those decisions. The result

is that many non-meritorious actions have been prevented or ended before they could result in years of litigation.

A few examples of such suits are as follows:

- A patient who enlisted a family member's help to get out of bed and attempt elopement from the hospital against medical advice was prevented from having her lawyer pursue a medical malpractice case against the hospital for the institution's alleged failure to prevent her wrongful elopement because no expert supported the claimed cause of action.
- A lawyer's effort to enlist the "expert" services of a former client who happened to be a retired nurse and who had no expertise in the diagnosis or treatment of psychiatric patients was prevented from using his former client's opinion to support a malpractice case filed against a Board Certified psychiatrist, two Board Certified Emergency Medicine specialists, a hospital and other health care providers based on their alleged failure to properly diagnose and treat the patient's mental illness.
- A plaintiff who was unable to produce *any* expert's opinion regarding alleged delays in the diagnosis of her colitis was prevented from having her lawyer continue an action filed against her primary health care providers.

Now that the Appellate Court and the Supreme Court are enforcing the language of the good faith statute as the General Assembly intended, some members of the plaintiffs' bar attempting to undo these salutary effects by drastically altering the statutory scheme applicable to medical malpractice actions. The legislature should resist this effort and prevent return to the climate of crisis that gave rise to need for the original legislation.

II. THE PROPOSED AMENDMENTS WOULD VITIATE THE LAW

In accordance with the Legislators' language and intent in passing the 2005 amendment, the Appellate Court recently held that a plaintiff's failure to obtain, prior to the commencement of the action, the detailed, written opinion of a "similar health care provider" mandates dismissal

and is not curable. The proposed amendment would completely undermine the statutory purpose that the Appellate Court recognized, namely, “[b]ecause the purpose of § 52-190a is to require the opinion prior to commencement of an action, allowing a plaintiff to obtain such opinion after the action has been brought would vitiate the statute’s purpose by subjecting a defendant to a claim without the proper substantiation that the statute requires.”^x

The requirements of § 52-190 are modest, particularly when compared with protections afforded health care providers in other states. The Connecticut Supreme Court has held that § 52-190a does *not* require that a plaintiff obtain a written expert opinion that the alleged negligence actually caused a plaintiff injury.^{xi} Instead, all the good faith statute requires is what one would expect of any diligent lawyer who contemplates filing a lawsuit that alleges professional negligence: consultation with an expert who by definition is qualified to opine about breach of the applicable standard of care in order to verify that a good faith basis for suit indeed exists.

It is noteworthy that § 52-190a does not require the author of the written opinion to express an opinion to a “reasonable degree of medical probability” that a defendant was negligent. “Reasonable medical probability” is the standard that must be satisfied at trial. Because the required good faith inquiry is a pre-suit endeavor, the General Assembly instead adopted a much more modest standard, requiring the expert only to opine that there “appears to be evidence of medical negligence.”

Moreover, in light of the statute’s purpose, the statutory requirement that the author of a written opinion be a similar health care provider as defined under § 52-184c is only logical. For example, if a lawsuit names as defendants a psychiatrist and a surgeon, it makes eminent sense that an expert psychiatrist whose opinion is offered in support of the good faith basis for suit

would not be allowed to offer opinions about the defendant surgeon's breach of the standard of care, but only be allowed to offer opinions about the defendant psychiatrist. In that regard, for purposes of the good faith pre-suit written opinion, the statute defines a "similar health care provider" by the wholly objective standards found in subsections (b) and (c) of § 52-184c.^{xii} Thus, § 52-190a does not require plaintiff's counsel to determine whether a particular expert author would be qualified to testify at trial as to a particular defendant -- an inquiry that can be subjective and a judgment call of a neutral judge. Instead, the General Assembly quite logically and rightly enacted a wholly objective, bright-line definition of "similar health care provider" to benefit both plaintiffs and health care provider defendants: putative plaintiffs know what specialists they must consult to validate their good faith bases for suit, and defendants know that at least one expert who has expertise in their same area of practice believes that there is evidence of possible negligence.

Similarly, the requirement that the author of the written opinion include a detailed basis for the formation of the opinion is not onerous. Nor is obtaining a written opinion from a "similar health care provider" under the objective definitions of subsections (b) and (c) of § 52-184c. Instead, the written opinion assures that the plaintiff filing suit has not done so because of some misunderstanding of the expert's opinion. Provision of the written opinion (and its attachment to the initial suit papers) also serves to protect the plaintiff from subsequent allegations that the suit was non-meritorious. At the same time, the written opinion affords the defendant(s) notice of areas of concern as well as notice that at least one peer questions the quality of the professional care that was rendered.

III. THE CURRENT STATUTE IS FULFILLING ITS PURPOSE

The statutory requirement that a plaintiff obtain, prior to commencement of an action, a written expert opinion from a similar health care provider has reaped benefits for Connecticut health care providers who otherwise would have had to endure the trials and tribulations of the litigation process in inadequately investigated cases. One example is a case called Plante v. Charlotte Hungerford Hospital, et al., in which the plaintiff's attorney sued a hospital, a psychiatrist, a licensed crisis worker, and two emergency medicine physicians, claiming that they provided negligent care to a patient with mental illness. The "expert" on whom the attorney relied to support the suit was a retired nurse and former client of the attorney. She had worked for twenty-two years in a nursing home and had no experience treating the mentally ill. Under the old version of § 52-190a, the sufficiency of the pre-suit inquiry could not have been challenged until discovery had concluded -- which would have taken many years and tens of thousands of dollars in legal expenses. The current version of § 52-190a allowed the defendants to obtain summary dismissal of the Plante case, which was manifestly the right result.

If Raised Bill No. 5537 is passed, it will eliminate the beneficial effects of the 2005 amendments to the good faith statute and return Connecticut health care providers to the mercy of lawyers and parties who fail to properly investigate lawsuits before filing them. Moreover, Connecticut health care providers will be doubly wronged, because the Raised Bill leaves intact the benefits to plaintiffs that were traded in return for the statute's extra burdens -- statutory caps on jury verdicts and extension of statutes of limitation and repose to allow extra time for pre-suit investigations.

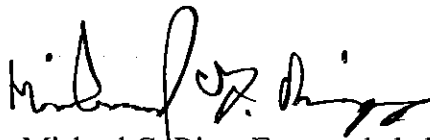
The public will be wronged as well, because it is the public that ultimately will suffer when scarce health care resources are squandered to restore a status quo that benefits no one

except some lawyers who fail to fulfill their ethical responsibilities to their clients and properly investigate suits before filing them.

IV. CONCLUSION

The good work achieved by the Legislature in 2005 should be continued -- not undone. We respectfully submit that the recommendations set forth herein are appropriate and necessary in order to prevent recreation of the malpractice crisis that caused havoc in the past and that will cause havoc again. The narrow interests of a few members of the plaintiffs' bar should not be allowed to override the public's interest in the delivery of health care by providers whose time and efforts are best devoted to their patients -- not to the defense of non-meritorious law suits.

Very truly yours,



Michael G. Rigg, Esq., on behalf of
The Lawyers at O'Brien, Tanski & Young, LLP

MGR/oy

ⁱ *Barrett v. Montesano*, 269 Conn. 787, 796 (2004).

ⁱⁱ *Bruttomesso v. Northeastern Connecticut Sexual Assault Crisis Services, Inc.*, 242 Conn. 1, 15 (1997).

ⁱⁱⁱ *LeConche v. Elligers*, 215 Conn. 701 (1990).

^{iv} Milford Hospital's insurance premium increased by 480% from 2001. Medical Malpractice and Miscellaneous Bills Before the Judiciary Committee, 2005 Judiciary (April 8, 2005) [hereinafter Judiciary Hearing] (statement of Richard Pugh). Griffin Hospital's premium doubled from 2001 to 2005. *Id.* at 301-302 (statement of Patrick Charmel, President and CEO of Griffin Hospital). See also, *Id.* at 195-196 (statement of Steven O'Brien, M.D.) (200% increase from 2001 to 2004); *Id.*, at 206-207 (statement of Fitzhugh Pannill, M.D.) (increase from \$3,400 in 1997 to \$20,000 in 2002); *Id.* at 314 (statement of Vincent Pepe, M.D.) (30 to 40% of gross receipts was expended paying his professional liability premium); *Id.*, at 322 (statement of Larry Lazor, M.D.) (increase from \$40,000 for coverage of \$7 million in 1995 to \$120,000 for coverage of only \$2 million per case in 2005); *Id.*, at 329 (statement of Malcolm Brown, M.D.) (rates increase from \$17,000 to \$55,000 in 4 years); Medical Malpractice before the Insurance and Real Estate Committee, 2005 Insurance and Real Estate Committee 136 (Feb. 10, 2005) [hereinafter

Insurance Hearing} (statement of Ayaz Madraswalla, M.D., President-Elect of the Connecticut Academy of Family Physicians) (premiums for family physicians had increased 20% to 30% each year over the previous four years).

^v A rate increase of 89% submitted by one of the insurance carriers in the state was reviewed by the actuarial staff of the Insurance Department and was found not to be excessive. *Insurance Hearing*, *supra* n. 6, at 9 (statement of Susan Cogswell, Commissioner, State Insurance Department). *See also*, *Judiciary Hearing*, *supra* n. 6, at 118 (statement of Denise Funk, CEO of Connecticut Medical Insurance Company) (CMIC requested a 14% increase); *Id.*, at 253 (statement of MaryAnn McDonnell, M.D.) (insurance company proposed a 90% increase in her group's rates).

^{vi} Patrick Charnel, President and CEO of Griffin Hospital, testified that the hospital's premium increase since 2001 was "equivalent to half of the hospital's annual drug budget. It would pay for the entire cost of the hospital-wide picture archive and computer system to digitize, display, store and retrieve diagnostic radiology images. ... It would cover the investment required to convert to an electrical medical record [system] ... It could equip three operating rooms with state-of-the-art laparoscopic video surgery and patient-monitoring equipment...[T]he \$1 million could have been used to hire 15 additional registered nurses to provide a higher level of patient care and to provide a better working environment for our nurses, who shoulder an ever-increasing burden." *Judiciary Hearing*, *supra* n. 6, at 302-303.

^{vii} Milford Hospital lost 20% of its obstetrical staff. *Judiciary Hearing*, *supra* n. 6, at 224 (statement of Richard Pugh). In Greenwich, two obstetric practices merged so that three of the physicians could drop obstetrics. *Id.*, at 252 (statement of Maryann McDonnell, Chairwoman of the Connecticut Section of the American College of Obstetrics and Gynecology). Marc Storch, M.D., a Westport obstetrician stopped delivering babies, and his premiums dropped from \$150,000 per year to \$17,000. *Id.* at 263 (statement of Marc Storch, M.D.). Grove Hill Medical Center lost three vascular surgeons and an obstetrician because of the premiums. *Insurance Hearing*, *supra* n. 6, at 158 (statement of Kirsten Anderson, M.D., Medical Director).

^{viii} *See*, *Insurance Hearing*, *supra* n. 6, 154 (statement of Martin Ross, M.D.) (changed insurance carriers twice because his carriers stopped writing insurance in Connecticut).

^{ix} *Insurance Hearing*, *supra* n. 6, at 2-4 (testimony of Susan Cogswell, Commissioner, Connecticut Insurance Department); *Judiciary Hearing*, *supra* n. 3, at 7-8 (testimony of Susan Cogswell).

^x *Votre v. County Obstetrics and Gynecology Group, P.C.*, 113 Conn. App. 569, 585, *cert. denied*, --- Conn. ____ (2009). The Court also stated as follows: "The defendants properly moved for dismissal, the statutory remedy in a medical malpractice action in which the proper documents are not annexed to the complaint. The plaintiff could not turn back the clock and attach by amendment an opinion of a similar health care provider that did not exist at the commencement of the action." *Id.*, at 586.

^{xi} *Dias v. Grady*, 292 Conn. 350 (2009).

^{xii} *Dias v. Grady*, 292 Conn. 350 (2009) (§ 52-190a compelled that, as to a particular defendant, the author of the written opinion had to be a § 52-184c similar health care provider, who, by definition, would be qualified to testify to the rigors of the applicable standard and its breach, but who might very well not be qualified to express a causation opinion).